(2) that the Government did not inform him that the appeal had been lodged;
(3) that the plaintiff was not informed of the date on which the appeal would be considered;
(4) that he was given no opportunity to deal with the complaints against him or to present and develop the reasons why he refused his consent to a SESCO supply;
(5) that the receipt of the letter of November 19, 1975 was the first he knew that there had been an appeal and that the Governor-in-Council had dispensed with his consent.

Both the learned trial judge and the Federal Court have held that upon the true construction of section 15(2) and (3) of the Ordinance the rule of natural justice known as the *"audi alteram partem"* rule applies. The law is fully set out in the judgment of the learned judge and was accepted by the Federal Court. Their Lordships agree and would wish to add nothing to their treatment of the point.

The learned trial judge went on to find a breach of natural justice, namely that the plaintiff was not given a proper or any opportunity of being heard, *i.e.* of presenting his case orally or in writing to the Governor-in-Council before a decision on SESCO's appeal was taken. The Federal Court does not demur from this finding. Their Lordships have no doubt that it was correct.

The Federal Court, however, decided the case against the plaintiff on a point with which, in their judgment, the learned judge had failed to deal adequately, or even at all. They reached the conclusion that, notwithstanding the failure to give the plaintiff the opportunity to state his case, the Governor-in-Council had all the material evidence before him and that he could have come to no other conclusion than that the plaintiff's consent had been unreasonably withheld.

Counsel for the respondents sought to support this conclusion by two submissions, one of fact and the other of law. Upon the facts, they made two points. First, the plaintiff was well aware (as, indeed, he was) of the discontent of some of his consumers and of their efforts to persuade the Government to allow SESCO into Saratok. Secondly, the plaintiff's whole case is to be found in his lawyers' letter of August 8, 1973, which was placed before the Governor-in-Council. Upon the law, they submitted that the result of the appeal would have been no different even if the plaintiff had been able to state his case to the Governor-in-Council and that accordingly the breach of procedure in not affording him this opportunity cannot give him a remedy in the courts. They relied upon a dictum of Lord Wilberforce in *Malloch* v. *Aberdeen Corporation*[1] at page 1595B:–

"The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

The factual submission fails upon two grounds. First, because it is based on a misapprehension of what is required of the Governor-in-Council by subsection (3) of section 15 of the Ordinance. The misapprehension is that under the subsection consent shall be deemed to be unreasonably refused if the licensee is not willing and able to supply electricity upon the terms which SESCO is willing and able to offer. The Federal Court also fell into this error, the Chief Justice who delivered the judgment of the court saying that in such circumstances the licensee's consent, however reasonable he may think he is to refuse it, is deemed to be unreasonably refused. But the subsection says nothing of the sort: it requires the Governor-in-Council to have "regard, *amongst other things* (emphasis supplied), to the terms upon ... which" SESCO is willing and able to supply. "To have regard, amongst other things" is far different from an obligation to treat SESCO's terms as conclusive of reasonableness. An illustration of the point in another branch of the law may be seen in the construction placed by the House of Lords upon section 17(2) of the English statute, Trade Union and Labour Relations Act 1974: *N.W.L. Limited* v. *Woods*[2]

Secondly, it was urged that the plaintiff's full case was presented to the Governor-in-Council in the letter of August 8, 1973. The letter is, in their Lordships' view, no more than an indication of his case, namely that he can and does supply electricity on reasonable terms. It is no substitute for detailed evidence and argument. Yet this is what would be needed on an appeal to the Governor-in-Council who has to decide not only on the reasonableness of the licensee's charges but whether in all the circumstances he should exercise his discretion against him.

These being their Lordships' conclusions on the factual submission, it is unnecessary to consider the point of law. Their Lordships think it impossible on the facts of this case to know what the Governor-in-Council would have decided, had the plaintiff been given an opportunity to develop orally or in writing his full case before the decision was taken. It cannot be said with any certainty that the decision would have been the same.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be allowed and the order of the trial judge restored. The respondents must pay the costs of the appellant before this Board and in the Federal Court.

Appeal allowed.

Solicitors: *Linklaters & Paines; Coward Chance; Stephenson Harwood.*

ZAIBUN SA BINTI SYED AHMAD v. LOH KOON MOY & ANOR.

[P.C. (Lord Diplock, Lord Elwyn-Jones, Lord Russell of Killowen, Lord Keith of Kinkel and Lord Brandon of Oakbrook) March 9 and April 20, 1982] [Privy Council Appeal No. 27 of 1980]

Contract – Agreement to sell land – Specific performance – Agreement providing for damages – Court's exercise of discretion – Specific Relief Act, 1950, (Act 137), ss. 11 & 19.

This was an appeal from the decision of the Federal Court reported in [1978] 2 M.L.J. 29. The respondents had claimed specific performance of a contract for the sale of land against the appellant. The learned trial judge had found in favour of the respondents

but found that there was an oral agreement enabling the respondent to pay damages for breach. He therefore gave damages in favour of the respondents. The respondents appealed to the Federal Court seeking specific performance of the contract and the Federal Court held that the respondents were entitled to specific performance. The appellant appealed.

Held: (1) the present case was one which required the exercise of the discretion of the court to order specific performance at the suit of the purchaser. The contract was one for the sale of immovable property, there was no sustainable objection that the conduct of the purchaser was such as to disentitle her to equitable relief and there was evidence that the land in question was of particular importance for use in association with her neighbouring tin mining operations, in particular the deposit of tailings;

(2) there was not sufficient evidence in this case to show that the vendor had agreed if she defaulted to pay $5,000 in consideration of the purchaser agreeing not to claim specific performance and to claim only damages;

(3) the fact that there was an alternative claim for damages in an action by the purchaser for specific performance of a contract for the sale of land could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

G.M. Godfrey Q.C. (Michael Stewart with him) for the appellants.

Francis Ferus Q.C. (Miss Elizabeth Gloster with him) for the respondents.

Cur. Adv. Vult.

Lord Russell of Killowen (delivering Judgment of the Board): This appeal from the Federal Court of Malaysia arises from an action by the respondents as purchasers against the appellant as vendor for specific performance of a contract dated December 11, 1973 for the sale and purchase of land in the Mukim of Serdang in the district of Bandar Bahru at a price of $1,100 per relong, the total purchase price being some $75,000. The action was on its face a normal one for specific performance requiring the vendor (present appellant) to transfer the land to the purchaser in fact Loh Koon Moy, Lam Wai Kee having acted on her behalf. The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract – a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff. The vendor put in a defence which raised a number of points on all of which she failed. In the middle of cross-examination of Lam Wai Kee an amendment of the defence was permitted raising yet another plea on which the vendor also failed. Their Lordships do not find it necessary to comment on these failed points, except to remark that, insofar as they raised questions of fact upon which evidence conflicted, that given on behalf of the vendor was rejected by the judge.

The agreement for sale was in no way remarkable: it provided for payment by the purchaser of a deposit and part payment of $5,000, which was then paid by cheque the receipt of which was then acknowledged. As emerges the vendor appellant did not in fact cash the cheque.

After the amendment to the defence already mentioned the cross-examination of Lam Wai Kee continued. The judge's notes contain the following passage:

> "I agree that there is no mention in the agreement if either the purchaser does not pay the balance of the purchase price or the vendor should refuse to sell, what should the consequence be. As a businessman I agree if the purchaser fails to pay the balance of the purchase price the deposit will be forfeited. There was such understanding to the said agreement. There was no undertaking that the vendor has to pay double the amount of deposit if she fails to abide by the agreement. But she has to pay all the damages. The $5,000 deposit would also be refunded. These undertakings are not incorporated in the agreement. It is not mentioned in the agreement that the Vendor must sell and the purchaser must buy."

This passage suggests that in some form the content of an alleged contemporaneous oral agreement, which would or might stand in the way of an order for specific performance, was being suggested to the witness. But the witness appears (i) only to have said as a generalisation that a defaulting purchaser loses his deposit, which is quite correct but does not touch on the fact that such a purchaser can also be ordered specifically to perform by paying the balance of the purchase price, (ii) to have expressly denied that if the vendor defaulted she was to pay double the amount of the deposit: she would have to pay all the damages and refund the deposit – which is only one possibility of a vendor's default and contains no reference to specific performance either as excluded by a contemporaneous oral agreement or otherwise.

The vendor herself gave evidence: it was not suggested to her that there was any contemporaneous oral agreement touching the question of specific performance, though she had said that Lam Wai Kee had explained the agreement to her: she was not however present when the agreement was signed, Lam Wai Kee signing on her behalf.

The first defence witness, Gohar Iman Bin Abdul Rahim Moghal, was the husband of the vendor. He stated in evidence in chief that he was present at the signing of the agreement, with the vendor, a brother of the vendor, and Lam Wai Kee: after stating correctly that the written agreement did not contain any terms covering default by either party, he continued "There was an understanding should the second plaintiff [sic: but presumably meaning the purchaser] fail to abide by the said agreement the $5,000 [the deposit] would be forfeited, plus damages, and if the defendant refused to sell, she has to refund the $5,000 already paid plus an additional $5,000".

The vendor gave evidence. She said in chief –

> "Apart from what is written in the agreement, there was a verbal agreement to the effect that should the purchaser not wish to buy the property in question the amount deposited i.e. $5,000 would be forfeited. Should the vendor not sell the property then he will have to repay double the amount, i.e. $10,000. The vendor has to return the $5,000 and pay me another $5,000."

The third defence witness, Abdul Rashid Bin Syed Ahmad, brother of the vendor, said nothing on those lines in chief, but in the course of his cross-examination said "There was also a verbal agreement between them that if we [i.e. vendor] refused to sell the land we have to pay double amount of deposit to the purchaser and when the purchaser refused to buy the deposit would be forfeited".

There was no challenge in cross-examination to this evidence introduced on behalf of the vendor. This is not surprising since no such oral agreement was ever pleaded, as of course it should have been. However the case has pro-

ceeded as far as this Board without that point apparently being taken, and their Lordships are unwilling in those circumstances to dimiss this appeal on a pleading point. It is however legitimate to note that the lack of cross-examination cannot in the circumstances be taken as tantamount to acceptance by the purchaser of the evidence. It is also to be observed that the evidence of all three was that if the vendor defaulted the vendor would have to pay $5,000 and return the deposit of $5,000: the evidence of the vendor and her brother was that if the purchaser defaulted the deposit would be forfeited, but the husband said that in those circumstances the deposit would be forfeited *and* the purchaser would have to pay damages.

One thing is plain: nobody gave evidence that there was an oral agreement that neither vendor nor purchaser would claim specific performance of the written agreement.

Section 11 (1) of the Specific Relief Act provides –

"Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced –

(c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief."

Section 11 (2) provides –

"Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved."

Pausing there it is plain that the instant case is eminently one which required the exercise of the discretionary ability to order specific performance at the purchaser's suit: not only was there the requirement of a contract of sale of immovable property leading to a presumption by the court "unless and until the contrary is proved" that section 11(a)(c) was applicable: additionally there was no sustainable objection that at any stage the conduct of the purchaser was such as to disentitle her to equitable relief: and further the evidence was that the land in question was of particular importance to the purchaser for use in association with her neighbouring tin mining operations, in particular the deposit of tailings.

What is there to the contrary? The learned judge considered that a contemporaneous oral agreement served to prove that the vendor's breach of this contract to transfer immovable property could be adequately relieved by compensation in money, which displaced the presumption required of the court by section 11 (2), and made section 11 (1)(c) inapplicable. He held that section 92 proviso (b) of the Evidence Act applied to save the agreement's admissibility: a point which their Lordships do not find it necessary to approve or disapprove. The vendor's evidence on this oral agreement was, the judge said, corroborated by her husband: if that is limited to what was to happen on a vendor's default well and good: but it was not so in relation to a purchaser's default. The judge said further that it was substantiated by the evidence of Lam Wai Kee already quoted. Their Lordships can only agree with the Federal Court that it was not so substantiated. The judge went on to find that the oral agreement was that, in the event of default by the purchaser, the deposit would be forfeited plus damages: only the vendor's husband said that: and that in the event of default by the vendor she would have to refund the deposit and pay additionally $5,000.

Their Lordships are uncertain what ultimate conclusion the judge arrived at in deciding not to order specific performance. In the event he decided that the vendor must repay the deposit plus another $5,000: but since the deposit cheque had not been cashed that came to $5,000. He then proceeded to award a further $5,700 under the further or alternative claim for "Damages" – a total therefore of $10,700. It looks as though the judge was treating the $5,000 as something which the vendor had agreed (if she defaulted) to pay in consideration of the purchaser agreeing not to claim specific performance and to claim only damages. But no evidence came anywhere near that.

The real question however is whether the judge was right to refuse specific performance. If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored section 19 of the Specific Relief Act, the terms of which are as follows:

"A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

If the judge considered he had jurisdiction to order specific performance but declined in the exercise of discretion to order it, he certainly in one respect took into consideration a wholly irrelevant matter – for in leading to a conclusion that "specific performance ought not to be granted" he started the sentence "Taking into consideration the alternative prayers of the plaintiffs in their pleadings ...". The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion. Accordingly the Federal Court was entitled to exercise its discretion and in their Lordships' opinion was correct in reversing the decision of the judge and ordering specific performance.

Accordingly the Appeal must be dismissed with costs, and their Lordships advise His Majesty the Yang di-Pertuan Agong accordingly.

Appeal dismissed.

Solicitors: *Coward Chance, Parker Garnett & Co.*

HARON BIN MOHD. ZAID v. CENTRAL SECURITIES (HOLDINGS) BERHAD

[P.C. (Lord Wilberforce, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Bridge of Harwich and Sir William Douglas) April 26, 1982] [Privy Council Appeal No. 55 of 1980]

Practice and Procedure – Appeal – Summary Judgment – Leave to enter final judgment – Whether final or interlocutory – New and different grounds relied on in appeal to Federal Court – Important issues of fact in contention – Unconditional leave to appeal given – Rules of Supreme Court, 1957, Order 14, Order 54 rule 22A – Courts of Judicature Act, 1964.

In this case the respondents had agreed to sell to the appellants 1,400,000 fully paid up shares in a public company for the total